The Central Law Journal.

*SAINT LOUIS, AUGUST 2, 1878.*

## CURRENT TOPICS.

In *Duwell v. Bohmer*, 10 Ch. L. N. 356, SWING, J. sitting in the United States Circuit Court for the Southern District of Ohio, has decided that the circuit courts of the United States have jurisdiction of a suit in equity to restrain the infringement of a trade mark, registered in accordance with the provisions of the Act of Congress, irrespective of the residence of the parties to the suit, and that the fact that both complainant and respondent are citizens of the same state does not deprive them of jurisdiction. The reported decisions contain no case in which this question has been expressly determined.

The opinion of the Supreme Court of Florida in *Johnson v. Pensacola & Perdido R. R.*, 18 Alb. L. J. 66, contains a learned and exhaustive examination as to the right of common carriers at common law (there being no statute in the state regulating freights and charges by railroad companies), to fix charges for services. The conclusions of the court were that as against a common or public carrier, every person has the same right; that in all cases, where his common duty controls, he can not refuse A and accommodate B; that all, the entire public, have the right to the same carriage for a reasonable price, and at a reasonable charge for the service performed; that the commonness of the duty to carry for all does not involve a commonness or equality of compensation or charge; that all that the shipper can ask of a common carrier is, that for the service performed he shall charge no more than a reasonable sum to him; that whether the carrier charges another more or less than the price charged a particular individual, may be a matter of evidence in determining whether a charge is too much or too little for the service performed, and that the difference between the charges can not be the measure of damages in any case, unless it is established by proof that the smaller charge is the true, reasonable charge, in view of the transportation furnished, and that the higher charge is excessive to that degree. The obligations in this matter must be reciprocal. Where there is no express contract, the common law action by the carrier against the shipper is for a *quantum meruit*, and the liability of the shipper is for a reasonable sum in view of the service performed for him. What is charged another person, or the usual charge made against many others (the freight tariff) is matter of evidence admissible to ascertain the value of the service performed. In every case the legality of the charge is established and measured by the value of the service performed, and not by what is charged another, unless what is charged the other is the compensating sum, in which event it is the proper sum, not on account of its equality, but because of the relation it bears to the value of the service performed, as an adequate compensation therefor. To sum the whole matter up, the common law is that a common carrier shall not charge excessive freights. It protects the individual from extortion, and limits the carrier to a reasonable rate, and this on account of the fact that he exercises a public employment, enjoys exclusive franchises and privileges, derived in the case of defendant here, by grant from the state. The rule is not that all shall be charged equally, but reasonably, because the law is for the reasonable charge and not the equal charge. A statement of inequality does not make a legal cause of action because it is not necessarily unreasonable.

In *Lowe v. Lowe*, recently decided by the Court of Appeals, of Kentucky, the question arose as to the character of certain farming lands which had been purchased for the purpose of carrying on the partnership business of farming. After the death of one of the partners it was claimed by the widow that the land was impressed with the character of personal property, and that she was entitled under the statute to one-half of her deceased husband's share in the partnership lands. The court, however, decided against her. The doctrine of courts of equity, that real estate held by trading partnerships, purchased with partnership funds, and used for partnership purposes, is to be treated as personal property, is based on the assumption that the part-

ners intended it to be so treated, and thereby converted it into personalty. The decisive question in these cases is, whether from the nature of the partnership business, the extent and character of the real estate owned by the firm, and the attending circumstances, the court can gather that it was the intention of the partners to treat the real estate as personalty. Cornwall v. Cornwall, 6 Bush, 369; Galbraith v. Gedge, 16 B. Mon. 631; Ripley v. Waterworth, 7 Vesey, 425; Thornton v. Dixon, 3 Bro. C. C. 190; Bell v. Phyn, 7 Vesey, 453; Randall v. Randall, 7 Sim. 271; Cookson v. Cookson, 8 Sim. 529. By the last English case cited, the doctrine of the courts on the subject has been thought to be so modified as to render it necessary, in order that partnership land may be converted into personalty beyond what is necessary for partnership purpeses, that there should be an express agreement to that effect. In his note to section 94 of Story on Partnership, Mr. Gray says: "The subject has often been alluded to in the American courts, and the books are full of *dicta* on the matter; but there seems to be but few cases, in which the point has arisen directly for decision between the widow or heirs on one side, and the personal representatives on the other;" and he cites the following list of cases in which it has been held that, in the absence of an agreement for an absolute conversion into personalty, the claims of the widow and heir must prevail: Wilcox v. Wilcox, 13 Allen, 562; Buckley v. Buckley, 11 Barb. 43; Goodburn v. Stevens, 5 Gill, 1; Hale v. Plummer, 6 Ind. 121; Summey v. Patton, 1 Winst. Eq. 52; Dilworth v. Mayfield, 36 Miss. 40; Piper v. Smith, 1 Head, 93. This seems to us to be the true doctrine, with this modification, that the agreement necessary to be shown may be either expressed or implied. If expressed, of course no difficulty can arise; but if no agreement be expressed, then the court is to decide on all the facts whether the partners intended their real estate to be treated as part and parcel of their capital stock, not only for the purposes of the partnership, but for all purposes. When such an agreement or intention is shown from the nature of the partnership business, the character and extent of the real estate involved, and the partners mode of treating and considering it, it should be held to be personalty, not only for partnership purposes, but for purposes of distribution also. But in the absence of such facts and circumstances as will warrant the court in finding that it was intended or agreed by the partners that their real estate should be regarded as personalty for all purposes, it should only be so regarded for the purposes of the partnership, and after these are answered, the surplus should be held to be real estate for all other purposes.

## WILLFUL ACTS OF SERVANTS.

Three several articles upon this general subject have recently appeared in this journal, which display much diligence and research. See 6 Cent. L. J. 281, 412, 483. The conclusions reached, though different, seem quite reasonable from the particular standpoints respectively taken, or assumed.

One difficulty in the way of a satisfactory solution of the question considered is, as to the legal meaning of the word "willful," as applied to acts of servants; and also, as to the rule governing the motives under which they have acted, as well as to the character of the employment.

Before we float further on the waves of this debate (as Webster on a memorable occasion said), let us see how far the elements, misunderstandings, or misapplications of terms have driven us from our true course. The term "willful" seems to be compounded from the two words, *will* and *full*; the will predominating over reason; stubborn; not to be moved or persuaded by reason; refractory, as a stubborn mule or ass. Webster has it: "Governed by the will without yielding to reason; obstinate, perverse."

What constructions have the courts put upon the term "willful," as applied to acts of servants? It will be seen by authorities on this general subject that a discriminating line is drawn between cases where a servant assaults a passenger of a common carrier, and where an injury is done by the same servant to a stranger not a passenger.

Thus in Goddard v. Grand Trunk Railway Company, 57 Maine, 202; 2 Am. R. 39, the court, in an elaborate opinion, observes: "It may be true that if the carrier's servant willfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers." So that, an act which would be ad-

judged sufficient to hold the master, who is a common carrier, liable for an act of his servant, would not, ordinarily, be sufficient to make him liable in damages where the same servant, with the same motives, commits an assault upon a stranger. This distinction, it seems to us, it is necessary to keep clearly in view, to determine or to fairly consider the different phases of the question. The language of many decisions is to the effect that, while the carrier of passengers is not an insurer against every danger, he is bound to protect his passengers against the violence and insults of strangers and co-passengers; and, *a fortiori*, against menace, violence and insults of his own servants. The reason is obvious. The carrier selects his own servants and can discharge them at pleasure, and it is, therefore, only reasonable that he should be held responsible for the manner in which they execute their trust. And thus, in general terms, it may be said that, where a contract exists between the master and a third person, the master is responsible for the acts of the servant in executing that contract. *Vide* Howe v. Newmarch, 12 Allen, 55; Angell and Ames on Corp., 8th ed. 404; Moore v. Railroad, 4 Gray, 465; Seymour v. Greenwood, 7 Hurl. & Norm. 354.

In Railroad v. Vandever, 42 Penn. St. 365, the court says: "A railroad company selects its own agents at its own pleasure, and it is bound to employ none except capable, prudent and humane men." In another railroad case the jury, under directions, found specially that the plaintiff was injured through a *willful act*; and yet the court held that the willfulness of the act did not defeat the plaintiffs' right to recover. See Weed v. Railroad, 17 N. Y. 362. So in Railroad v. Derby, 14 How. 468, the company was held liable for the act of the engineer in running the locomotive over the road for his own gratification. See Railway v. Hinds, 53 Penn. 512; Flint v. Transportation Company, 34 Conn. 554; Niets v. Clark, 1 Cliff. 145; Railroad v. Blocher, 27 Md. 277. And the cases generally hold that the carrier is conclusively presumed to have promised to do what, under the existing circumstances, the law requires him to do.

If by the term "willful" is meant something done on purpose, as some of the authorities seem to imply, and thereby constituting a question which may go to the jury, we submit that the case must be one other than against a common carrier of passengers for an act committed *while the passenger is on the cars of the carrier*, for the master is liable in such case whether the servant quits sight of the object for which he was employed or not. At least such is our view of the law in the light of many authorities. But suppose the servant of a carrier of passengers, for example, has an altercation with a passenger as to whether or not he paid his fare, and harsh words ensue, and after the passenger has alighted the servant pursues him and makes an assault upon him, doing bodily injury, would the master then be liable? According to the case of Chamberlain v. Chamberlain, 3 Mason, 242, Judge Story would doubtless hold the master liable, even in such a case, for he there expressed the hope that every violation of respectful treatment of passengers ought to be visited in the shape of damages, with its appropriate punishment. The question, however, whether or not the person injured had ceased to be a passenger, often arises, and is an important element in the case.

We think, as one of the writers in this journal on this subject has said, that much perplexity on this subject springs from the difficulty of framing a general rule to guide the court in determining what is properly a jury question. It seems to us that where the servant is shown to have acted with mixed motives, *i. e.*, partly within the scope of his employment and partly from personal malice, it may properly be submitted to the jury to determine that particular issue, and the law then can fix the liability.

The subject is liable to be discussed from an erroneous standpoint unless the distinction is sharply drawn between acts which are done within the line of the servant's employment and those acts committed outside the scope of his duty; the circumstances and character of the service are to be carefully considered.

If the servant—conductor of a railroad train or horse-car line for example—uses bad judgment in endeavoring to maintain order on his car, or in the act of collecting fares, an entirely different rule is, and should be, applied from that where the same servant quits his car and makes an assault upon a person who has just alighted from his car, for the purpose of maliciously beating him, it may be for some

offensive language used by the person who has just completed his ride on the car.

The law, from public policy, demands of common carriers and those generally who carry passengers for hire, a strict and careful regard for their safety and convenience, and the courts properly require that passengers shall be treated with respect and with a decent regard for their safety, free from insult or assault.

Every servant performing a duty has, in the nature of things, to exercise a certain discretion; and thus, the law expects and requires that the master shall have a care both to the character and the manner of man in whom he trusts the often delicate duty of performing the full scope of employment for which he is engaged. And thus the courts, during the last quarter of a century more particularly, have quite uniformly held the master liable, not only for acts of the servant where palpably erroneous judgment has been exercised, but for malicious acts where the motives appear mixed, *i. e.*, partly performed directly within the scope of duty, and partly from malicious motives, or outside his line of employment. And we believe that the decisions of our courts in that direction have, in the main, been wise and salutary; for it follows, as a thing of course, that the stricter the rule of accountability, the greater and surer the guaranty of safety to public travel becomes.

The question is how far, taking into view the purpose for which the servant was hired, and the circumstances under which he may have occasion to act, the master, trusting to his judgment or discretion, becomes liable for his acts. As the courts hold carriers of passengers to a strict line of duty, few cases arise where the master is relieved of responsibility. But more difficult classes of cases are those, for instance, growing out of the acts of wagoners, hackmen, express drivers, and the like, who are employed to drive in such capacities, and act simply as such drivers.

For example: 1. A., being regularly employed to drive B.'s wagon, intentionally runs into the carriage of C., and causes much damage; would B. be held liable? 2. A hackman, the servant of C., demands of a passenger more for the service than the passenger considers proper and right; hard words arise, and the hackman beats and injures him; would C. be held for damages? 3. A conductor of a railroad train willfully, but with malice towards none, without authority, and contrary to any publicly advertised regulations of the road, stops the train on a wide prairie in midwinter for several hours, during which time a death is occasioned thereby; would the railroad company be liable in damages for such conduct on the part of the conductor?

These are some of the questions which have been difficult of satisfactory determination, and we should be exceedingly glad to see an expression of opinion upon them.

J. F. B.

## NATURALIZATION LAWS — "GOOD MORAL CHARACTER"—EFFECT OF PARDON.

### *IN RE* SPENSER.

*United States Circuit Court, District of Oregon, July*, 1878.

Before HON. MATTHEW P. DEADY, District Judge.

1. ADMISSION TO CITIZENSHIP—REQUISITES.— An alien, to be entitled to admission to citizenship, must first prove that he has behaved as a man of good moral character during *all* the period of his residence in the the United States.

2. WHAT IS "GOOD MORAL CHARACTER"— PERJURY.—What constitutes good moral character may vary in some respects in different times and places, but a person who commits perjury does not behave as a man of good moral character, and is not therefore entitled to admission to citizenship.

3. A PARDON IS PROSPECTIVE AND NOT RETROSPECTIVE in its operation, and while it absolves the offender from the guilt of his offense and relieves him from the legal disabilities consequent thereon, it does not obliterate or wipe out the fact of the commission of the crime, so that it can not be made to appear on an application to be admitted to citizenship.

DEADY, J.:

William Spenser, an alien, applies to "be admitted to become a citizen of the United States," under sec. 2165 of Revised Statutes. From the evidence it satisfactorily appears that he duly declared his intention, and has continuously resided in the United States—the State of Oregon—at least since 1870. He is, therefore, entitled to be admitted to citizenship, if it appears that during such residence "*he has behaved as a man of good moral character*, attached to the principles of the Constitution of the United States, and well disposed towards the good order and happiness of the same." Sec. 2165, *supra*, Sub. 3.

The proof shows that the applicant has resided in Oregon, near the Dalles, for more than eight years; that in 1876, and after he had declared his intention, he was duly convicted in the circuit court of the state for Wasco county, of the crime of perjury, committed by swearing falsely as a witness in a case in said court, in which he was a party, and sentenced to five years' imprisonment in the pen-

tentiary; that after being in prison fifteen months and eight days, he was unqualifiedly pardoned by the Governor, upon, as the pardon recites, the petition of sundry citizens of Wasco county, and because it appeared that there were doubts as to his guilt, and unless he was released from prison there was danger that he would lose his homestead.

Upon this state of facts two questions arise: 1. Has the applicant "behaved as a man of good moral character" within the meaning of the statute; and 2, what is the effect of the pardon in this respect.

In the first place, during what time is the behavior of the applicant open to consideration? The statute—*supra*—declares: "It shall be made to appear to the satisfaction of the court admitting such alien, that he has resided within the United States five years at least, * * * and that *during that time* he has behaved as a man of good moral character," etc. Is an alien who has behaved as a man of good moral character during the five years immediately preceding his application, but who has not so behaved during his residence in the United States prior thereto, entitled to admission? I think not. The behavior of the applicant during *all* the time of his residence within the United States is material. The good of the country does not require, and it does not appear to be the policy of the law to promote the naturalization of aliens who have, at any time during their residence in the United States, behaved otherwise than as persons of good moral character. The citizenship of the country is sufficiently alloyed and debased by the presence of immoral natives, without the addition of those born in foreign countries.

The applicant must not simply have sustained a good reputation, but his *conduct* must have been such as comports with a good *character*. In other words, he must have behaved—conducted himself—as a man of good moral character ordinarily would, should or does. *Character* consists of the qualities which constitute the individual; *reputation* the sum of opinions entertained concerning him. The former is interior, the latter external. The one is the substance, the other the shadow. N. Y. P. Code, 120; 8 Barb. 603.

What is "a good moral character" within the meaning of the statute may not be easy of determination in all cases. The standard may vary from one generation to another; and probably the average man of the country is as high as it can be set. In one age and country duelling, drinking and gaming are considered immoral, and in another they are regarded as very venial sins at most. The only authorities I have been able to find upon this subject, are the cases of *Ex parte* Douglas and *Ex parte* Sandberg, cited in 2 Bright, Fed. Dig. 25, from 5 West. Jur. 171. These cases hold that an alien who lives in a state of polygamy, or believes that polygamy may be rightfully practiced, in defiance of the laws to the contrary, is not entitled to citizenship.

Upon general principles it would seem that whatever is forbidden by the law of the land ought to be considered for the time being immoral, within the purview of this statute. And it may be said with good reason that a person who violates the law thereby manifests, in a greater or less degree, that he is *not* "well disposed to the good order and happiness" of the country. *Good* behavior—that behavior for which a person reasonably suspected of an intention to misbehave, may be required to give surety, is defined to be the conduct authorized by law, and *bad* behavior such as the law punishes. Bou. Dic. *verba*, Behavior; 2 Black. 251, 256.

But perjury is not only *malum prohibitum*, but *malum in se*. At both the civil and common law it was classed among the *crimen falsi*, and wherever, as in this case, it affected the administration of justice, by introducing falsehood and fraud therein, it was, at common law, deemed infamous, and the person committing it held incompetent as a witness and unworthy of credit. 4 Saw. 213.

There can be no question, then, but that a person who commits perjury has so far behaved as a man of bad moral character. But it may be said that an alien who has otherwise behaved as a man of good moral character during a residence in the country of at least five years ought not to be denied admission to citizenship on account of the commission in that time of a *single* illegal or immoral act. This suggestion is based upon the idea that it is sufficient if the behavior of the applicant was generally good—that the good preponderated over the evil. In some sense this may be correct. For instance: the law of the state prohibits gaming and the unlicensed sale of spirituous liquors. These acts thereby become immoral. But their criminality consists in their being prohibited and not because they are deemed to be intrinsically wrong—*mala in se*. Now, if an applicant for naturalization, whose behavior, during a period of five or more years, was otherwise good, was shown to have committed during that time either of those or similar crimes, I am not prepared to say that his application ought to be denied on account of his behavior. And yet it is clear that anything like habitual gaming or vending of liquors under such circumstances would constitute bad behavior—immoral behavior—and be a bar under the statute to admission to citizenship. But in the case of murder, robbery, theft, bribery or perjury it seems to me that a single instance of the commission of either of them is enough to prevent the admission. The burden of proof is upon the applicant to prove "to the satisfaction of the court" that during the period of his probation he has conducted himself as a moral man. But when the proof shows that he has committed an infamous crime, it is not possible in my judgment to find that his behavior has been such as to entitle him under the statute to receive the privilege and power of American citizenship.

What effect, if any, does the pardon have upon the application? By the constitution of this state, article V., § 14, the governor has power to grant pardons, after conviction for all offenses, except treason, "subject to such regulations as may be prescribed by law." The criminal code makes no restrictions upon the power of the governor, except that he must first require the judge or district at-

torney who tried the case to give him a statement of the facts. Or. C. C. c. 32. This pardon does not show that this statement was asked for or obtained, nor does it appear therefrom what gave rise to the alleged doubts as to the defendant's guilt. But this suggestion can not affect the truth or effect of the judgment which established his guilt. So far then as this application is concerned the matter stands thus: The applicant was duly convicted of perjury, and the governor, in the exercise of that mercy which belongs to him in his official character, has pardoned him for reasons of his own, that are immaterial to this inquiry.

The pardon is now produced by the applicant to show, not only that his crime has been forgiven him, but *that it never was*, and therefore it can not now be relied upon to prove that he has not behaved as a man of good moral character during his residence in the United States. In *ex parte* Garland, 4 Wall, 380, Mr. Justice Field, speaking for a majority of the court, says: "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eyes of the law the offender is as innocent as if he had never committed the offense." This is probably as strong and unqualified a statement of the scope and efficacy of a pardon as can be found in the books. And yet I do not suppose the opinion is to be understood as going the length of holding that while the party is to be deemed innocent of the crime by reason of the pardon from and after the taking effect thereof, that it is also to be deemed that he never did commit the crime or was convicted of it. The effect of the pardon is prospective and not retrospective. It removes the guilt and restores the party to a state of innocence. But it does not change the past and can not annihilate the established fact that he *was* guilty of the offense. And such, I think, is the doctrine of the authorities cited in support of this opinion, namely: 4 Black. 402; 6 Bac. tit. Pardon H. Blackstone's language is. "The *effect* of such a pardon by the king is to make the offender *a new man*: to acquit him of all corporal penalties and forfeitures annexed to that offense for which he obtained his pardon; *and not so much to restore him to his former, as to give him a new credit and capacity.*" And the author goes on to state that a pardon does not purify the blood during the period it was corrupted by conviction, and gives the following illustration: "Yet if a person attainted receives the king's pardon and *afterwards* hath a son, that son may be heir to his father, because the father being made a new man might transmit new inheritable blood; though had he been born *before the pardon he could never have inherited at all.*" Bacon says—a pardon makes the party "as it were a new man." It removes the punishment and "legal disabilities consequent on the crime." It restores his competency to be a witness, "but yet his credit must be left to the jury." From these authorities it is plain that a pardon does not operate retrospectively. The offender is purged of his guilt and *thenceforth* he is an innocent man, but the past is not obliterated, nor the fact that he *had* committed the crime wiped out.

Apply these principles to this case. By the commission of the crime the applicant was guilty of misbehavior within the meaning of the statute during his residence in the United States. The pardon has absolved him from the guilt of the act, and relieved him from the legal disabilities consequent thereupon. But it has not done away with the fact of his conviction. It does not operate retrospectively. The answer to the question—has he behaved as a man of good moral character?—must still be in the negative; for the fact remains, notwithstanding the pardon, that the applicant was guilty of the crime of perjury—did behave otherwise than as a man of good moral character.

The fact that the applicant can not obtain title to his homestead unless he is admitted to citizenship can not affect the consideration of the question. Doubtless, in this respect, the matter operates as a hardship upon him. But this only illustrates the truth of the proverb—"the way of the transgressor is hard"—and in the long-run it is better for the world that it should be so.

The proof is not satisfactory that the applicant has behaved as a man of good moral character during his residence in the United States, but the contrary; and, therefore, the application is denied. But the applicant having no counsel, and the matter having been submitted without argument, and being now *res judicata*, if he shall be hereafter advised that there is probable error in this ruling, he may apply within a reasonable time to set aside the judgment denying his application, and for a rehearing thereof.

## PRINCIPAL AND AGENT—UNLAWFULLY RECEIVING PRINCIPAL'S PROPERTY FROM AGENT—WISCONSIN STATUTE.

### VICTOR SEWING MACHINE CO. v. HELLER.

*Supreme Court of Wisconsin, January Term*, 1878.

HON. E. G. RYAN, Chief Justice.
" ORSAMUS COLE, }
" WM. P. LYON, } Associate Justices.
" DAVID TAYLOR, }
" HARLOW S. ORTON, }

1. AGENCY—BARTERING PRINCIPAL'S PROPERTY.—An agent has no right, as against his principal, to pledge his principal's property as security, or to transfer the same for goods bought for himself.

2. RECEIVING PRINCIPAL'S PROPERTY FROM AGENT UNLAWFULLY.—Any person who deals with an agent, knowing him only as agent to sell, without other powers, and receives the principal's property from the agent, will have no right to keep the same as against the principal.

3. WISCONSIN LEGISLATION CONSTRUED. — The provisions of the Wisconsin statute as to factors, etc. (L. 1863, ch. 91, sec. 3) construed, and a person who barters with an agent, *held*, not to be protected by its provisions,

4. PRACTICE—INFORMAL VERDICT.—It is not error for a judge to detain the jury immediately after discharge, for the correction of informalities in a verdict.

TAYLOR, J., delivered the opinion of the court:

The evidence in this case shows that one W. H. Lyman was employed as the agent of the respondents in the spring of 1873, for selling the Victor sewing-machine in a part of Chippewa county, including Chippewa Falls; that the respondents were not doing business at that time in Chippewa Falls, except by said Lyman as agent; that sometime in the spring of 1873 Lyman bargained with the defendant for the sale of a sewing machine, and after several unsuccessful attempts, a machine was lett with the defendant, under the following circumstances: The defendant purchased the machine conditionally, to be paid for in full if after trial it suited the defendant. At the time of the purchase the defendant sold the agent, out of his store, goods to the amount of $24 or $25, which were received by the agent in part payment of the machine, but if upon trial it did not suit the defendant, he was to return it and the agent was to pay for the goods so taken in part payment. The agent, Lyman, makes a slightly different statement in regard to it. He says: "I bought of defendant a bill of goods, about $21, and he requested me to leave this last named machine with him until the goods were paid for, and I made a written agreement between myself and the defendant to that effect. These goods were to pay in part for the machine, if it proved satisfactory to him. He did not like the machine and notified me to take it away, which I agreed to do as soon as I had money to pay for the goods." Again, Lyman says: "It was more as a pledge for the goods purchased of him than a sale, though it might lead to a sale if an agreement could be had."

The evidence also shows that the defendant was at the time selling dry goods, groceries and fancy goods at Chippewa Falls, and that the agent, Lyman, in addition to his agency for the plaintiffs, was keeping a dollar store at the same place. Both the agent and the defendant understood that in case the machine did not suit the defendant he was to hold the same as security until the goods were paid for by the agent.

The court instructed the jury as follows: "If the plaintiffs employ an agent to sell their property, and if the evidence shows no more as to the agents power or authority, there certainly can not be claimed for the agent, on that alone, any right, as against his principal, either to pledge the property as security for the agent's debt, or to transfer the property in payment for goods bought for himself and for his own use. And any person who in any such transaction deals or treats with the agent, *knowing him only as agent to sell, without other powers*, and under such a transaction, receives the principal's property from the agent, will have no right in law to keep the same as against the principal."

"So if you find from the evidence that the man Lyman either left the sewing machine in question with the defendant as a pledge or security for Lyman's own debt to the defendant, or in consideration of goods sold by the defendant to Lyman, the defendant at the same time *understanding with reference to the relations between Lyman and the plaintiffs, simply that Lyman was authorized to sell sewing machines for them*, you must conclude that the defendant acquired thereby no right to the machine nor to the possession thereof. And from the time that the machine was detained by the defendant under any such transaction between him and the agent Lyman, he, the defendant, must be regarded as holding the machine adversely to the plaintiffs, and as converting it to his own use."

To these charges the defendant duly excepted. These instructions were undoubtedly correct, if the powers of an agent for the sale of personal property are to be governed by the rules of the common law, wholly unaffected by the statutes of this state relating to factors and agents entrusted with the possession of property for the purposes of sale. This act has recently been under consideration in this court, and after most learned and exhaustive arguments by counsel on both sides, this court has given a construction to a portion of that statute.

The case referred to is Price v. Wisconsin Marine and Fire Ins. Co., decided February 28, 1878. The opinion is published in Nos. 20 and 21, Vol. 2, of the *Northwestern Reporter*. In this case the learned chief justice has reviewed the decisions made under similar statutes, both in New York and England, and has, we think, most clearly shown that this court can not follow the decisions of the courts of New York in its construction of this statute, without substantially repealing the same by judicial construction. The conclusions arrived at by the chief justice in that case are fully concurred in by all the present members of this court. In that case the question was as to the rights acquired by the pledgee of a negotiable warehouse receipt, by a factor to whom such receipt had been transferred to such factor by his principal, or which his principal had empowered him to purchase and retain; and the conclusion arrived at was, that in such case the principal entrusts his factor with the power to pledge, as well as to sell, in favor of one dealing in good faith with the factor; that notice that the holder of such warehouse receipt holds it as a factor is not notice of any limit of the factor's power of disposition by sale or pledge, as between the factor and his principal; and that a factor's sale or pledge of such receipt, in violation of his instructions, will not bind his principal, if the vendee or pledgee has notice that the factor holds his title for a principal, and sells or pledges in violation of the instructions of the principal.

The acts under consideration in the case above cited were sec. 6, chap. 340, L. 1860, as amended by sec. 1, chap. 73, L. 1863, and sec. 3, chap. 91, L. 1863. Sec. 6, chap. 340, L. 1860 as amended, provides, amongst others, "that warehouse receipts for goods, etc., may be transferred by delivery with or without indorsement thereof; and any person to whom the same may be so transferred shall be deemed and taken to be the owner of the goods, etc., therein specified, *so far as to give validity to any pledge, lien or transfer made or created by such person or persons.*" Sec. 3, chap. 91, L. 1863 provides "that every factor or other agent entrusted with the possession of any bill of lading, custom-house permit, or warehouse receipt, for the delivery of any such merchandise, (referring to mer-

chandise shipped as mentioned in the preceding sections of the chapter), *and every such factor or agent not having the documentary evidence of title*, who shall be entrusted with the possession of any merchandise, for the purpose of sale, or as security for any advances to be made or obtained thereon, shall be deemd to be the true owner thereof, *so far as to give validity to any contract made by such agent with any other person for the sale or disposition of the whole or any part of such merchandise for any money advanced, or negotiable instrument, or other obligation in writing given by such other person upon the faith thereof.*"

It is insisted by the appellant that the evidence in this case brings it within the protection of sec. 3, chap. 91, L. 1863, above quoted, and consequently the instructions given by the circuit judge were erroneous. We do not think so. It will be seen by an examination of the provisions of the acts above cited, that a factor or other person holding a negotiable warehouse receipt by transfer, either with or without endorsement, shall be deemed and taken to be the owner of the goods, etc., therein specified, "*so far as to give validity to any pledge, lien or transfer made or created by such person or persons*," and that a factor or other agent who is entrusted with the possession of any merchandise for the purpose of sale or as security for any advances to be made or obtained thereon, "shall be deemed the true owner thereof, so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of the whole or any part of such merchandise *for any money, advanced or negotiable instrument or other obligation in writing given by such other person upon the faith thereof.*"

The two sections are materially different. Under the first, any pledge, lien or transfer made by the holder of the receipt is made valid, whereas under the second the contract of the agent is made valid so far only as to protect the person dealing with such agent "*for any money advanced or negotiable* instrument, or other obligation in writing given by such other person."

The case of Price v. Wisconsin Marine Fire Ins. Co., cited above, was a case arising under sec. 6, chap. 340, as amended by sec. 1, chap. 73, L. 1863, and was the case of a pledge for money advanced, and was protected even under the provisions of sec. 3, chap. 90, L. 1863. The case at bar must come within the provisions of sec. 3, chap. 91, L. 1863, to be protected at all.

The provisions of sec. 3, chap. 91, L. 1863, are in derogation of the common law, and when construed as applicable to a person who deals with a person knowing him to be an agent for another, has always been construed, to say the least, not literally in favor of such person. It appears to us that under any fair construction of this section, a person who barters with an agent is not protected thereby.

He can not be said to have advanced *money* upon the faith of the property received. The particular words used in the statutes exclude the idea that a barter with the agent can be protected.

It would seem that the legislature did not intend to protect a man dealing with an agent to sell, who deals with him in a way which he is presumed to know is in violation of his contract with his principal.

The evidence in the case simply shows that Lyman was the agent of the plaintiffs to sell machines. No evidence was given to show the powers of the agent, other than this general statement of his agency. It was not shown, or attempted to be shown, that the agent had power to barter away the machines, or that he had in fact been accustomed to barter the machines either with or without the knowledge or assent of his principals, and no evidence was given to show that the agent had any lien on this or any other machines in his possession, either for commissions or money advanced thereon. The case as presented was simply either a pledge by the agent to secure a debt of his own, or it was a conditional sale, or exchange and part payment made in goods sold to the agent, the payment for such goods to be secured by pledge of the machine in case the defendant was not satisfied with it. As the proof shows, he was not satisfied with the machine, refused to pay for the same and notified the agent to take it away. He held the same at the time of the commencement of this action, as a pledge for the goods sold to the agent. This he clearly had no right to do. The instructions given by the circuit judge were not, therefore, erroneous.

We do not think there was any error committed by the court with respect to the verdict. It is true the record shows that the judge, after the delivery of the verdict, said to the jurors they were discharged; but immediately thereafter, before they had left their seats or communicated with any one, the judge called their attention to the imperfections in the verdict, and having put the same in the form which the jurors affirmed they intended it to be, it was signed by the foreman, and as so amended declared by the jury to be their verdict. The judges of the circuit courts are frequently called upon to perform a work of this kind. Jurors unacquainted with the forms of law very often deliver very informal verdicts, and where their intentions are clearly indicated by such informal verdict, it becomes the duty of the court to put it in proper form, before it is entered as the verdict of the jury. It is in furtherance of justice that the judge should do so. When it is clear that the verdict as finally put in form by the court, is the one intended by the informal one delivered by the jury at first, no injustice is done to the parties if, after the same is so put in formal shape, the jury without further consultation and without again retiring to consult, assent to the entry thereof.

The judgment of the circuit court is affirmed.

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AN English judge has recently pronounced a sentence that seems somewhat strained. A boy of eighteen was charged with administering oxalic acid to his wife with the intention of poisoning her. The prisoner's wife detected it before she had taken enough to do her any harm, and decisive evidence was adduced as to the probable effect of the poison draught had the woman swallowed the whole of it. The wife in court stated that she had forgiven her husband, and begged that his punishment might not be excessive. The response of Justice Hawkins to that appeal was a sentence of penal servitude for life.

## CONVEYANCES BY HUSBAND TO WIFE WITH POWER OF REVOCATION—BANKRUPTCY—WHAT POWERS DO NOT PASS TO ASSIGNEE.

JONES, *Assignee*, v. CLIFTON.

*United States Circuit Court, District of Kentucky, July*, 1878.

Before Hon. BLAND BALLARD, District Judge.

1. SETTLEMENT BY HUSBAND ON WIFE — POWER TO REVOKE.—A husband being at the time free from debt, and without the contemplation of bankruptcy, conveyed certain lands to his wife to her separate use free from his control. The deeds reserved to the husband a power of revocation in whole or in part, and a power of appointment to any uses or persons as he might designate either by deed or will. Three years later he became bankrupt. *Held*, that the settlement would be upheld as against the assignee in bankruptcy.

2. THE OMISSION, IN A VOLUNTARY SETTLEMENT, to insert a power of revocation, will subject the settlement to suspicion in a court of equity.

3. WHEN A SETTLEMENT IS MADE BY A HUSBAND free from debt—when it is induced by no fraudulent motive—when it makes no more than a reasonable provision for the wife—when it conveys *any* benefit on her, a court of equity will uphold it. Though the grant may not contain every provision which a chancellor would direct to be inserted in a settlement ordered by himself, though it contains reservations tending to impair the full benefit of the provision made for the wife, yet if the grant confer any substantial benefit on the woman, so long as she is in the actual enjoyment of that benefit, a court of equity will protect her.

4. POWERS WHICH DO NOT PASS TO ASSIGNEE UNDER BANKRUPT ACT.—Powers of revocation and appointment to be exercised by the bankrupt do not pass to the assignee, under § § 5044 and 5046 of the bankrupt act. The "power" which is enumerated and does pass, is only the power to sell, manage, dispose of, sue for and recover, or defend the property and rights which do pass.

*B. H. Bristow and Jas. A. Beattie*, for plaintiff; *Bijur & Davie*, for defendants.

BALLARD, J.

On the 3d of October, 1872, the defendant, Chas. H. Clifton, being then free from debt, and with a fortune probably exceeding two hundred and fifty thousand dollars, conveyed to his wife, without the intervention of a trustee, a small parcel of land, worth about seven hundred dollars, and assigned to her five policies of insurance on his life, each for ten thousand dollars, but at the time not worth more in the aggregate than twelve thousand dollars. On the 1st of April, 1873, being still free from debt, and with his fortune very little diminished, he made another conveyance to his wife, also without the intervention of a trustee, of two parcels of land, one situated in the city of Louisville and the other in the county of Jefferson. The first parcel was, at the time of this conveyance, and still is, incumbered by mortgage to probably its full value. The other parcel was the homestead of the ancestors of the grantor, and was estimated to be worth eighteen thousand dollars. On this parcel he afterwards erected a dwelling-house which cost eight thousand five hundred dollars.

By both deeds, and substantially in the same terms, the property was conveyed "to the said Nannie to hold to her and her heirs forever as her own separate estate, free from the control, use, and benefit of her husband." By both deeds, and substantially in the same terms, power and authority were conferred on the grantee to appoint the parcels of land and each or all of them, or part or parts of each, as often as she might choose to exercise the same to such uses as she might designate by joint deed with her husband, or by a writing in the form of and to take effect as a devise under the statute of wills of Kentucky, and by both deeds, in substantially the same terms, the grantor expressly reserved to himself power to revoke the grants in whole or in part, and to appoint to any such uses or persons as he might designate either by deed or last will. In default of appointment, or to the extent that the grantor might fail to appoint, each of said parcels of land was to remain to the grantee and her heirs forever as her separate estate, with the powers conferred upon her as above stated.

On the 4th of December, 1875, Clifton filed his voluntary petition in bankruptcy, and was adjudged bankrupt thereon, and the complainant, Stephen E. Jones, was appointed his assignee. In October, 1876, the assignee brought this suit in equity, in which he seeks to have both of the above-mentioned deeds declared void, and thus the clouds removed from his alleged title to the parcels of land and policies of insurance mentioned therein.

The bill proceeds on three grounds, all more or less connected, but still so distinct as to require a separate statement: First—That the making of the two instruments was a contrivance and scheme on the part of Chas. H. Clifton to cheat, hinder and defraud his *future* creditors. Second—That the conveyances having been made by the husband to the wife, without the intervention of a trustee, are, because of this, and because of the reservations contained therein, especially the absolute power of revocation, void, and so passed no title or interest to the nominal grantee. Third—That by operation of the bankruptcy act the property described in the instruments, or, at least, the powers of revocation therein reserved, passed to the complainant as assignee in bankruptcy. I shall examine each of these grounds separately.

The complainant has offered no testimony whatever of the alleged fraudulent intent. He does not even allege that the grantor at the time the conveyances were executed owed anything. The uncontroverted proof is that he was then free from debt; that he was not then engaged in trade; that he did not contemplate engaging in trade or contracting debts; that he was an indiscreet young man, who, though possessed of a large fortune, might squander the whole in reckless gaming and dissipation; that the settlements were made at the suggestion of his more prudent wife, and did not embrace more than one-sixth of his estate.

That Clifton might, under these circumstances, by *proper conveyances*, have settled on his wife this amount of property, free from all claims proceeding from his future creditors, or from his assignee in bankruptcy, is indisputable. The authorities everywhere sustain such settlements. Sexton v. Wheaton, 8 Wheat. 229; Hinds v. Longworth, 11 Wheat. 211; Haskell v. Bakewell, 10 B. Mon. 206; Lloyd v. Fulton, 91 U. S. 485; Smith v. Vodges, 92 U. S. 183. Authorities to the same point might be multiplied indefinitely.

The learned counsel of complainant themselves do not dispute that such settlements are generally unimpeachable. Their contention is that the settlements in controversy here were not made by *proper* conveyances; that the conveyances being made by the husband to the wife without the intervention of a trustee are void in law, and that by reason of the powers of revocation reserved they are void both in law and in equity.

It thus appears that the complainant does not now ask relief on the ground of the distinct fraud alleged. If he attaches any importance to the allegation of fraud contained in his bill, it is only because he considers that a deed made by a husband to his wife, containing a reservation of an absolute power to revoke it, is *per se* fraudulent. Thus considered, the complainant's first ground becomes blended with the second, and one and the same with it. I proceed, therefore, to consider the second ground.

Under the common law system the husband and wife are, for most purposes, regarded as one person. As a result of this legal unity, their contracts with each other, whether executory or executed, in parol or under seal, are void. This doctrine, it must be confessed, has little foundation in reason. It is wholly unknown in that enlightened system of jurisprudence which, coming down to us from the ancient civilizations, now prevails on the continent of Europe, and it has only a faint recognition in the system of equity jurisprudence which in England and in this country, has grown up by the side of the common law. In equity the husband and wife are for many purposes treated as two persons. Whilst at law all the personal property of the wife becomes on marriage the property of the husband, and the entire management and profits of her real estate pass to him, in equity she may not only own and manage her real and personal estate, but she may dispose of it free from the control of her husband. True, it was at one time doubted whether any interest in either real or personal property could be settled to the exclusive use of a married woman, without the intervention of trustees; but for more than a century and a quarter it has been established in courts of equity that the intervention of trustees is not indispensable, "and that wherever * * * property * * * is settled upon a married woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees, the intention of the parties shall be effectuated in equity, and the wife's interest protected against the marital rights of her husband, and of his crediters also." 2 Story's Equity Jurisprudence, sec. 1380.

Nor is it at all material whether the settlement is made by a stranger or by the husband himself. In either case the trust will attach upon him, and will be enforced in equity. It is now universally held that a settlement made by a husband on his wife by direct conveyance to her, will be enforced in the same manner and under the same circumstances that it will be when made by a stranger, or when made to a trustee for her exclusive use. Shepard v. Shepard, 7 Johns. Chy. 56; Jones v. Obenchain, 10 Gratt. 259; Sims v. Rickets, 35 Ind. 192; Thompson v. Mills, 39 Ind. 532; Putnam v. Bicknell, 18 Wis. 335; Burdens v. Ausperse, 14 Mich. 91; Barron v. Barron, 24 Vt. 398; Marraman v. Marraman, 4 Met. (Ky.) 84; Wallingsford v. Allen, 10 Pet. 594.

All voluntary conveyances, whether made wholly without consideration or upon the meritorious consideration of love and affection, are scrutinized and regarded with some suspicion in courts of equity, when they are sought to be impeached by creditors. But I have been referred to no case, and I have found none which hints that a reasonable settlement made by a husband, free from debt, on his wife by direct conveyance to her, is any more impeachable than when it is made through the intervention of trustees. Settlements made in either mode, when uncontaminated by actual fraud, are unimpeachable by subsequent creditors.

It may be admitted that a power of revocation, inserted in an assignment made by a debtor for the benefit of his creditors, would render such assignment constructively fraudulent, and therefore void. Riggs v. Murray, 2 Johns. Chy. 576; s. c. 15 Johns. 571; Tarback v. Marbery, 2 Ver. 570. But such power of revocation has never been held to affect a family settlement. On the contrary, in the above case of Riggs v. Murray, Chancellor Kent expressly declares that "family settlements may often require such powers of revocation to meet the ever-varying interests of family connections." Moreover, it is the well-settled practice in England to insert such powers in such settlements, unless, indeed, the *sole* object of the settlement is to guard against the extravagance and imprudence of the settler. Indeed, ever since Lord Hardwicke's time, the failure of the conveyancer to insert a power of revocation in a deed of family settlement has been regarded as a strong badge of fraud. Hugenin v. Basely, 14 Vesey, 273.

In some of the later cases such settlements have been annulled at the suit of the settler, apparently on the sole ground that they did not contain a power of revocation.

In Coutts v. Acworth, L. R. 8 Eq. 558, it was held that "the party taking a benefit under a voluntary settlement * * * containing no power of revocation, has thrown upon him the burden of proving that there was a distinct intention on the part of the donor to make the gift irrevocable." In Wallaston v. Tribe, L. R. 9 Eq. 44, the same rule is recognized and enforced. In Everett v. Everett, L. R. 10 Eq. 405, the Chancellor, in annulling a deed of settlement made by a young

woman soon after she arrived at age, chiefly on the ground that it contained no power of revocation, says, in substance: "The sole object of the settlement being to protect the settler and her children, if she married, had I been called on for advice, I should have said: 'Have proper trustees, give her a voice in the selection of new trustees, and give her a power of revocation with the consent of the trustees.'"

In Phillips v. Mullings, L. R. 7 Ch. App. 244, the court of appeal recognizes the same general rule, but in that case refused to annul the settlement, though it contained no power of revocation, on the distinct ground that the settlement was made by a young man of improvident habits to guard against his own folly, and "the deed was explained to him and the particular clauses brought to his notice." "Those who induce," said the Lord Chancellor, "a young man of this description to execute such a deed, are bound to show that the deed is in all respects proper, or, if the deed contains anything out of the way, that he understood and approved it. * * * It is not necessary to show that the usual clauses inserted by conveyancers were explained, but any unusual clauses must be shown to have been brought to his notice, explained and understood." In Hall v. Hall, L. R. 14 Eq. 365, the vice chancellor regarded the rule as so firmly settled that he felt impelled to annul a settlement twenty years after its execution, simply because it did not contain a power of revocation. The same rule has been recognized and adopted in the United States. Russell's Appeal, 75 Penn. St. 269; Garnsey v. Mundy, 24 N. J. Eq. 243. Some chancellor has intimated that a voluntary settlement partakes very much of the nature of a last will, and that it should be scarcely less revocable.

I feel much difficulty in yielding assent to the extreme doctrine announced in some of these cases, and I am glad to observe that it is somewhat modified and limited by the late case of Hall v. Hall, decided by the court of appeal in chancery in 1873—L. R., 8 Chy. Ap. 430. I quite agree with what Sir W. M. James, L. J., says in this case: "The law of this land permits any one to dispose of his property gratuitously if he pleases, subject only to the special provision as to subsequent purchasers and as to creditors. The law of this land permits any one to select his own attorney to advise him, and it seems very difficult to understand how this court could acquire jurisdiction to prescribe any rule that a voluntary conveyance, executed by a person of sound mind, free from any fraud or undue influence of any kind, and with sufficient knowledge of its purport and effect, should be void, because the attorney of his own selection did not advise him to insert a power of revocation, or did not take his express direction as to the insertion or omission of such power." The true rule is that laid down by Lord Justice Turner, in Toker v. Toker (3 D. J. and S. 487, 491), that the absence of a power of revocation is a circumstance to be taken into account, and is of more or less weight according to the circumstances of each case.

In the case now before me I think it could not be seriously contended that, had powers of revocation been omitted from the conveyances made by Clifton, this fact would have been entitled to much, if any, consideration, in a suit brought by him to annul the settlements. To such a suit the chancellor might have said, as Chancellor Latherly did in Phillips v. Mullens: "You were an exceedingly indiscreet and improvident young man. You made the settlements to guard against your own folly and extravagance, Of what advantage would it have been to place the money in this way, out of your control, and then give you power to destroy the limitations whenever you pleased."

But, whatever may be the true doctrine, all of the foregoing cases, and many more that might be cited, certainly do establish that it is ordinarily proper to insert a power of revocation in a voluntary settlement; nay, more, that the omission of such a power will subject the settlement to more or less suspicion. Certainly the practice in England for centuries has been to insert such a power in family settlements.

A practice which is thus approved by time, and which has received the sanction and enconium of courts of equity in both England and America, can not be regarded as vicious or immoral. Should I hold that these settlements of Clifton are fraudulent and void as to his subsequent creditors simply because they contain powers of revocation, I should overturn an ancient practice and a long course of decisions; nay, I should hold that courts of equity have themselves advised frauds to be committed.

The fact that Clifton inserted powers of revocation in his settlements, so far from proving that he contemplated defrauding his future creditors, tends to show the contrary. Should he simply revoke the settlements, then, of course the property conveyed would revert to him, and be liable at law for all his debts. And should he exercise the power of appointment for even the benefit of a stranger, then, according to an unbroken current of authority, the whole estate appointed would be liable in equity to his debts. Thompson v. Towne, 2 Vern. 319; *In re* Davie's Trusts, L. R. 13 Eq. 163; Williams v. Lomas, 16 Beavan, 1; Petre v. Petre, 14 Beav. 197. If, then, he had meditated a fraud he would have omitted the power altogether. He would have relied altogether on the affection and beneficence of his wife to provide for him. To contend that he intended to defraud his creditors, and at the same time to exercise the power of revocation arbitrarily, is to maintain a contradiction, since, as we have seen, the exercise of the power would, *ipso facto*, render the property liable in equity for his debts, unless, indeed, we can assume that he was gifted with a foresight which none of the facts warrant. A man, it is true, might make a voluntary settlement on his wife, and, contemplating that he might be adjudged a bankrupt in the future and be discharged from his debts, reserve a power of revocation for the very purpose of reinvesting himself in such contingency with the property, relying upon holding it free from debts contracted be-

fore bankruptcy. It is by no means certain that such a reliance would be safe. It is by no means certain that such a device would not be pronounced a fraud on the bankruptcy act. But assuming that it would not be fraudulent, there is nothing in the present case to suggest that the grantor had any such forethought or was actuated by any such motive. At the time of the settlements he was not only free from debt, but possessed of a large estate. He was not engaged in trade, and all the testimony shows that nothing was farther from his contemplation than bankruptcy. That he did in fact become bankrupt in the short space of two years is partly explained by the large shrinkage in the value of real property, and the decrease in its rents, but it is best accounted for by his frank confession that he has squandered much in reckless dissipation and gaming.

I do not mean to intimate that Clifton, having regard to the motive and circumstances which prompted these settlements, should not have reserved a power of revocation. Had he known his own habits as well as his acquaintances knew them, and had his motive been solely to guard against his follies, it would have been more consistent with that motive to deprive himself of all dominion over the estate settled. But he could not know himself as others knew him, and he doubtless had implicit faith that, even should misfortune overtake him, his affection for his wife would be a sufficient guaranty that he could not be persuaded to strip her of his bounty.

The settlements being of his own pure bounty, he might well wish to reserve to himself power to modify the limitations of them according to the future necessities and exigencies of his family. Then, too, the grantor has given reasonable explanation of the particular reservations contained in these deeds. He says that, at the time they were made, he contemplated removing to California, and that his object in reserving the powers of revocation was that he might change the investments from Kentucky to California. He did not expect to exercise the powers for his own benefit; he did not know that he could do so. He only contemplated settlements in California to the same uses declared in the original conveyances.

This suggestion derives additional force from the uncertainty in which the law of Kentucky stood at the time the conveyances were made in respect to the power of a married woman over her separate estate.

The Revised Statutes adopted in 1852 had, in effect, destroyed separate estates. They had, in effect, provided that where real or personal property should be conveyed or devised to the separate use of a married woman she should not alienate the same by joining her husband in an ordinary conveyance or in the exercise of a power, except when the estate was a gift, and then it might be conveyed by the consent of the donor, or his personal representative.

This provision was so anomalous that it gave much perplexity to the legal profession and produced much litigation. It was frequently amended, but, even down to the date of the settlements in question, its precise meaning and operation were not determined. So uncertain was its construction that timid lawyers might have been found who would not have advised the acceptance of a conveyance from husband and wife, of an estate conveyed by the husband to the separate use of the wife. At any rate, Clifton might well have thought it best to guard against the uncertainty by reserving to himself a power which would avoid all difficulty.

Every grantor in England has, by virtue of the second section of the statute of 27 Elizabeth, the substantial right to revoke and annul his voluntary conveyance, since such conveyance is declared by said statute to be fraudulent as to subsequent purchasers for value, with or without notice. Dolphin v. Aylward, L. R. 4 Eng. and Irish Appeals, 486; Roberts on Conveyances, 39, 40 and 41. A grantor may, therefore, revoke or annul his voluntary conveyance at any time by conveying the property included in such conveyance to a purchaser for value. But the statute is limited in its remedial operation to purchasers, and, consequently, such settlements can not be defeated by subsequent creditors. Dolphin v. Aylward; *supra*. So, also, the fifth section of the same statute, which makes all conveyances containing powers of revocation fraudulent and void as to subsequent purchasers, does not extend to creditors. Voluntary settlements, whether they do or do not contain powers of revocation, can not be assailed by creditors unless they are fraudulent. They are revocable by the grantor either by virtue of the express power reserved or by virtue of a subsequent conveyance for value, but it has never been held that they are on this account fraudulent as to creditors.

But, say complainant's counsel, Mrs. Clifton's title is but the "ghost of a title;" that the legal title is or was in her husband, who reserved to himself absolute power to revoke or to appoint to new uses, and that, therefore, it is not such a title as a court of equity will uphold.

I know it is sometimes said that a court of equity will not enforce every deed made by a husband to his wife. Bishop on the Law of Married Women, section 717. The cases usually cited to support this view are Beard v. Beard, 3 Atk. 71; Moyse v. Gyles, 2 Vern. 385; Stoit v. Ayloff, 1 Ch. Rep. 33. Of all these cases it may be said that they were decided at a time when the rights of married women were not so fully acknowledged or so zealously protected by courts of equity as they are at the present day. It is also to be observed that in the first case the gift was so extravagant as to excite just suspicion of fraud and undue influence. In the second the court refused to aid the defective grant on the ground that it was without consideration. In the third the contract was executory. None of these cases would at all impeach a grant containing no more than a fair provision for the wife, and if they would, they are opposed to the cases heretofore cited in this opinion, to the well-settled doctrine of the Supreme Court of the United States, and to the whole current of later authority.

When the settlement is made, by a husband free

from debt, when it is induced by no fraudulent motive, when it makes no more than a reasonable provision for the wife, when it confers *any* benefit on her, I can conceive of no reason why a court of equity should decline to uphold it. Though the grant may not contain every provision which a chancellor would direct to be inserted in a settlement ordered by himself, though it contains reservations tending to impair the full benefit of the provision made for the wife, yet if the grant confer any substantial benefit on the woman, so long as she is in the actual enjoyment of that benefit, a court of equity should and will protect her.

Again, complainant's counsel, whilst they admit that a husband may, by direct conveyance to his wife, make a provision for her which will be enforced in equity, whilst they substantially admit that the provision made by Clifton for his wife was reasonable, whilst they admit that the grants made by him are not void, simply because of the powers reserved in them, yet they somehow insist that all these things combined vitiate the deeds. Their contention is that, as the legal title remained in the husband, notwithstanding the alleged conveyances, and that as this legal title is coupled with absolute dominion over the property, as a legal consequence of the reserved powers, the whole right and property remained in the husband, and passed on his bankruptcy to his assignee. But if, as we have seen, the husband may make a conveyance to his wife which will be upheld in equity; if, as we have also seen, the reservation of a power of revocation or of new appointment does not render such settlement void, it is impossible to conceive that the union of the two particulars in the same instrument would destroy it. It is inconceivable that the mere union of two objections, each of which is a phantom, can render the compound substantial.

It must not be overlooked that complainant himself has appealed to a court of equity. In this court Mrs. Clifton's title is as complete as if she had been a *feme sole* when the conveyances were made to her. The husband's right and interest are not recognized in this court. Every argument, therefore, which is founded on the notion that any substantial title or interest remains in him can have no force in this forum.

The last proposition of complainant's counsel is that by operation of the bankruptcy act the property embraced in these settlements, or at least the powers therein reserved, which might be exercised by the grantor for his own benefit, passed to his assignee in bankruptcy.

We have seen that the title which the bankrupt at the time of his bankruptcy held in the property claimed was held in trust for his wife. Now, by the express terms of the statute, property so held does not pass to the assignee in bankruptcy. Section 5,053 of the Revised Statues provides that "no property held in trust by the bankrupt shall pass by the assignment."

To ascertain what property does pass to the assignee in bankruptcy, reference must be had to sections 5,044 and 5,046. The first of these sections provides that "as soon as the assignee shall be appointed and qualified, the judge or * * * register shall * * * assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee." The second provides that "all property conveyed by the bankrupt in fraud of his creditors, all rights in equity, choses in action, patent rights and copyrights, all debts due him, or any person for his use, and all liens and securities therefor, and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person arising from contract or from the unlawful taking or detention or injury to the property of the bankrupt; and all his rights of redeeming such property or estate, together with the right, title, power and authority to use, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, * * * be at once vested in such assignee."

It will be perceived that powers of revocation and powers of appointment, though they be such as may be exercised by the bankrupt for his own benefit, are not enumerated among the things which pass to the assignee either by virtue of the assignment or of the adjudication in bankruptcy. The "power" which is enumerated and does pass, is only the power to sell, manage, dispose of, sue for and recover, or defend the property and rights which do pass.

A power is not property or an estate. A power to convey or appoint property may be lodged in one having no interest whatever in the property over which the power is to be exercised, or in one having an estate or interest in it. But in either case the power is distinct from the estate. It may be that a grant of property to A, to dispose of it as he should please, would invest him with a complete title; but a grant to A for life, with remainder to such persons as he should by deed or will appoint, will not give him the absolute interest, although he might acquire it by the exercise of the power. 1 Sugden on Powers, 120; Maundrill v. Maundrill, 10 Vesey, 246; Reed v. Shergold, 10 Vesey, 371; Burleigh v. Clough, 52 N. H. 272; Collins v. Carlisle's heirs, 7 B. Mon., 13; McGaughey's admr. v. Henry, 15 B. Mon., 383. So a conveyance by A to B and his heirs in trust for A for life, remainder to such persons or uses as A. should appoint, and in default of appointment in trust for C and his heirs, would leave or vest in A a life estate only. Or, if A should convey to B in trust for himself for life, reserving to himself an absolute power of revocation, still A would have only a life estate in the property limited. The power of revocation reserved would neither render the conveyance void nor have the effect of enlarging his estate. The learned judges who decided the case of Willard v. Ware, 10 Allen, 263, certainly so understood the rule, else they need not have troubled them-

selves with the perplexing question presented in that case, whether the power of appointment reserved in the deed, which was there the subject of consideration, had been actually exercised.

The bankruptcy statute of 13 Eliz. "enables the commissioners to dispose of any estate for such use, right or title as such offender (bankrupt) then shall have in the same which he may lawfully depart withal." And the statute of 21 James I. directs bankrupt laws to be expounded most favorably for the relief of creditors. I quite agree with Sir Edward Sugden when he says that "as a power is a mere right" to declare the trust of an estate upon which declaration the statute of uses immediately operates, and, as it is therefore clearly a use, interest or right which the bankrupt "may lawfully depart withal," there is considerable ground to contend that the bargain and sale of the commissioner should have the same operation as the execution of the power by the bankrupt whilst solvent would have had, but such was never in fact the construction of these statutes. In Townshend v. Windham, 2 Vesey, Sr. 3, and in Thorpe v. Goodall, 17 Vesey, 338, Lord King is said to have held that in the case of a tenant for life, with power to charge £100, the power was not such an interest as would pass to the assignees.

Holmes v. Coghill, 7 Ves. 498, was thus: Sir John Coghill, under a settlement made by himself in 1757, reserved the power to himself to charge the estate, situate in certain counties, with any sum not exceeding £2,000. Sir John was also entitled to other estates, remainder in tail to his oldest son. The son arrived of age in 1787, and thereafter he and the father suffered a recovery, and then made a settlement. This settlement embraced all or some of the property mentioned in the settlement of 1757. It expressly extinguished the power reserved in the settlement of 1757, but it directed the trustees to raise such sum, not exceeding £2,000, as Sir John should direct, and pay the same to him or his assigns; or, if the same should not be raised and paid over in his lifetime, then upon trust to raise the same at such time and pay the same to such person as Sir John should appoint. By his will, dated in 1775, and therefore before this settlement, Sir John gave the sum of £2,000, to be raised under the power, to be applied to the payment of his debts. There was a codicil to this will which bore date subsequent to the settlement of 1787, but it took no notice of this power. The bill was filed by creditors. Held by the Master of the Rolls, Sir Wm. Grant—First: That the power reserved in the original deed of 1757 was discharged by the deed of 1787. Second: The will refers only to the power reserved in the deed of 1757, and consequently it is no execution of the power reserved in the deed of 1787. Third: There is an evident difference between a power and an absolute right of property. Fourth: Equity will aid the defective execution of a power, but it cannot itself execute a power. The case was affirmed on appeal, 12 Ves. 206. On the appeal it was urged that there is a difference between an estate to be created under a power which must be limited to a third person and one which may be limited to the donor himself. It was conceded that in the first case the power must be asserted, but in the latter it was strongly insisted that, as the donor had the same power over the estate which he had over his own estate, it should, in equity at least, be equally subject to his debts. But the court rejected the distinction, remarking: "If the argument in support of this appeal prevails, there must be an end of the distinction between the non-execution and the defective execution of a power."

In Thorpe v. Goodale, 17 Ves. 388; s. c. 17 Ves. 460, one who had been adjudged a bankrupt was seized for life of a certain estate, with a general power of appointment, with remainder in default of appointment to the heirs of his body. The suit was by his assignee to compel him to execute the power. Held by Lord Eldon that equity cannot compel the execution of the power. The learned chancellor, it is true, says that the question whether the power passed, by operation of law, to the assignee was not before him, but he refers to the opinion imputed to Lord King in such terms as to show that he approves it. Sir Edward Sugden says, in his work on Powers, vol. 1, p. 225, that upon a bill filed by the assignees against the purchaser in this same case, the Vice Chancellor was of opinion that the power did not pass to the assignee. He cites Thorp v. Frere (N. C., M. T. 1819), but I have not been able to find the case reported.

These decisions doubtless led to the enactment of 6th Geo. IV., 16, 5, 77. This statute provides that "all powers vested in any bankrupt, which may be legally executed for his own benefit (except the right of nomination to any vacant ecclesiastical benefice), may be executed by the assignees for the benefit of creditors in such manner as the bankrupt might have executed the same." A provision substantially the same has, I believe, been incorporated into every bankrupt act which has been passed in England since the date of the above statute, but no similar provision is to be found in our statute, and I must conclude that it was omitted *ex industria*. It certainly cannot be inferred that the draftsman of our statute was unfamiliar with this provision. It may be found in both of the English bankrupt acts of 1861 and 1869. And we know that many of the provisions in our original and amended acts were copied from these statutes.

But whether it was omitted intentionally or not may not be material. Our statute certainly contains no such provision, and it is impossible to construe it as passing to the assignee anything which the English statutes enacted prior to 6 Geo. IV. were held not to pass.

As the power reserved by the son in his settlements might be exercised for his own benefit, it is clear that if he was a bankrupt in England his assignee, in virtue of the recent statutes there, might exercise the power for the benefit of his creditors; but as we have no such statute here, as a power is neither real nor personal property, nor an estate of any kind, it is equally clear that this power did not pass to his assignee.

I have no doubt that, in respect to the property which does pass under our statute to the assignee, all the power and dominion which the bankrupt

had over it before his bankruptcy likewise passes. Nor have I any doubt that the bankrupt, in virtue of the general provisions of the statute, as well as in virtue of the express terms of section 5050, may be required to execute any instruments, deeds and writings which may be proper to enable the assignee to possess himself fully of the assets; but it is only in respect to the assets of the bankrupt which have passed to the assignee that he can be required to execute any instruments, deeds or writings. He can not be required to execute a mere power, since a power is not assets or property, or embraced among the things and rights which the statute declares shall pass to the assignee.

But, complainant's counsel insist that the justices of the supreme court have given construction to our statute to the effect that it does embrace powers to dispose of or charge property. In proof of this they refer to schedule B, which forms part of every bankrupt's petition, and which schedule was prescribed by the justices under authority of law (section 4490).

It is true that the caption of schedule B implies that the petitioner shall include therein "property in reversion, remainder or expectancy, including property held in trust for the petitioner, or subject to any power or right to dispose of or charge." It is also true that the directions in the body of that schedule seem to contemplate that the petitioner shall *mention* all "rights and powers wherein I (he), or any other person or persons in trust for me (him), or for my (his) benefit have any power to dispose of, charge or exercise.

No one more readily than I would submit to a decision of the supreme court; but I can not regard this schedule, though nominally prescribed by its justices, as a decision of the court. The judges can not in this way give an authoritative construction to the statutes.

Besides, the schedule does not purport to be a construction of the statute, nor does it necessarily imply that all the rights enumerated in it will pass to the assignee in bankruptcy. It is true it would seem idle to insert in the schedule anything in which the assignee could have no interest, but the petitioner can not be allowed to judge whether or not a given right or interest will pass to his assignee, and to include or exclude it from his schedule at pleasure. His assignee should be fully informed respecting his estate. He is entitled to have, and should have, all the information which the bankrupt himself has.

This may suggest some explanation of the requisitions contemplated by the form prescribed in the schedule. Certainly the form, in terms, contemplates that the schedule shall include a mere naked power to dispose of or charge property in which the bankrupt never had any interest, and which he could not dispose of or charge for his own benefit. Surely no one would be so bold as to contend that such a power passes in bankruptcy; yet, in my opinion, in view of the decisions in England before referred to, construing bankruptcy acts containing more comprehensive terms than ours, in view of the legislation there declaring that powers which a bankrupt may exercise for his own benefit shall pass to his assignee in bankruptcy, in view of the terms of our statute and its omissions, there is scarcely more ground for the contention that a power which may be exercised by the donee for his own benefit passes to the assignee, either in virtue of the assignment to him or of the adjudication in bankruptcy, than a power which must be exercised by the donee for the benefit of a stranger.

Let an order be entered dismissing the bill with costs.

## NOTES OF RECENT DECISIONS.

THE STATUS OF INDIANS AND THEIR OFFSPRING. *Ex parte Reynolds.* United States District Court, Western District of Arkansas, 18 Alb, L. J. 8. Opinion by PARKER, J.—1. Indians who maintain their tribal relations are the subjects of independent governments, and as such not in the jurisdiction of the United States, within the meaning of the constitution and laws of the United States, because the Indian nations have always been regarded as distinct political communities, between which and our government certain international relations were to be maintained. These relations are established by treaties to the same extent as with foreign powers. They are treated as sovereign communities, possessing and exercising the right of free deliberation and action, but in consideration of protection owing a qualified subjection to the United States. 2. When the members of a tribe of Indians scatter themselves among the citizens of the United States and live among the people of the United States, they are merged in the mass of our people, owing complete allegiance to the government of the United States, and equally with the citizens thereof, subject to the jurisdiction of the courts thereof. 3. The condition of the offspring of a union between a citizen of the United States and one who is not a citizen, *e. g.*, an Indian living with his people in a tribal relation, is that of the father. The status of the child in such case is that of the father. The rule of the common law and of the Roman civil law, as well as of the law of nations, to wit: *partus sequiter patrem*, prevails in determining the status of the child in such case.

ACTION BY SURGEON FOR CHARGES—EVIDENCE—PRESUMPTION. *Wooster v. Paige.* Supreme Court of California, 1 Pac. Coast L. J. 324.—1. In an action for a surgeon's fee, where the value of the services is denied and a counterclaim for damages for malpractice is set up, it is proper for the court to instruct the jury, as a matter of law, that the plaintiff was a competent surgeon. 2. In an action for a surgeon's fee, where the value of the services is denied, and a counterclaim for malpractice is set up, the presumption is that the plaintiff's treatment of the case was skillful and "that he was competent for the task which he had undertaken, and did his duty to the best of his ability." 3. A party can testify as an expert in his own behalf. 4. Upon the question of skill in the surgeon, it is competent for him to prove a specific instance of successful treatment of a different patient for the same disease. 5. In estimating the value of a surgeon's fee, it is not competent for the defendant to prove what other competent surgeons charged for treating the patient during similar periods for the same disease.

COMMON CARRIER — DESTRUCTION BY FIRE—ACT OF GOD. *Pennsylvania R. R. v. Fries.* Supreme Court of Pennsylvania, 35 Leg. Int. 263. Opinion by PAXSON, J.—A fire which had burned in the woods for several days near Osceola, a town upon the Tyrone and

Clearfield Railway, was, by a wind which suddenly sprung up, carried into the town, and consumed nearly all the buildings, and a large portion of the property of the citizens, as also the cars and property of the railroad company, including cars containing plaintiff's goods, which were standing upon a siding ready to be transported upon a branch road. *Held*, 1. The wind by which this fire was carried into the town was the act of God, and the company was not responsible for the freight burned. 2. The company was not bound to have an extraordinary force on hand to meet such a contingency. 3. The employees of the company were not bound to disregard the feelings of humanity which prompted them to succor women and children from peril for the purpose of giving their exclusive attention to save the plaintiff's property. 4. The assumption by the shipper of all risks, and the release of the company therefrom, relieves the company from all liability, except for negligence.

NATIONAL BANK—INTEREST.—*First Nat. Bank of Mt. Pleasant v. Duncan.* United States Circuit Court, Western District of Pennsylvania, 35 Leg. Int. 251. Opinion by Mr. Justice STRONG.—A national bank is entitled to the same privileges, in regard to charging interest, as is extended to state banks of issue in the states in which it has been located.

DOMICIL — WHAT CONSTITUTES — WHAT ACTS PROVE CHANGE OF DOMICIL. *Hindman's Appeal.* Supreme Court of Pennsylvania, 5 W. N. 347. Opinion by MERCUR, J.—1. A man's domicil is that place in which he has fixed his habitation, without any present intention of removing therefrom. Vattel's definition of domicil as "a fixed place of residence, with an intention of always staying there," is too limited to apply to the migratory habits of the people of this country. So narrow a construction would deprive a large portion of our people of any domicil. 2. The ascertainment of a man's domicil depends not upon proving certain facts, but whether all the facts and circumstances, taken together, tending to show that a man has his home or domicil in one place, overbalance all the like proofs tending to establish it in another. Abington v. North Bridgewater, 23 Pick. 170, followed. 3. A mere intention to remove permanently, without an actual removal, works no change of domicil; nor does a mere removal from the state without an intention to reside elsewhere. But when a person sells all his land, gives up all his business in the state in which he had lived, takes his movable property with him, and establishes his home in another state, such acts *prima facie* prove a change of domicil. Vague and uncertain evidence of declarations tending to show a contrary intention, not acted upon, can not remove the legal presumption thus created.

## SOME RECENT FOREIGN DECISIONS.

CHRISTIANITY AND THE LAW—CONTRACT—BREACH. —*Pringle v. Town of Napenee*, Queen's Bench of Ontario, 14 Canada L. J. 219. Christianity is part of the recognized law of this Province, and, therefore, to an action for breach of contract to let a public hall, a plea setting up that the purpose for which said hall was intended to be used was for the delivery of certain lectures containing an attack upon Christianity was a good defense, and plaintiff was not entitled to recover.

LESSOR AND LESSEE — BREACH OF COVENANT— COVENANT NOT TO USE HOUSE AS "BEER-SHOP — BEER SOLD TO BE CONSUMED OFF THE PREMISES.— *Bishop of St. Albans v. Battersby.* English High Court, Q. B. Div., 26 W. R. 679. A lease contained a covenant by the lessee not to allow any house on the land demised to be used as a "beer-shop." The lessee carried on the trade of a grocer in a house on the demised premises in partnership with his brother. The brother took out an excise license to sell beer at the house by retail, to be consumed off the premises, and did so sell beer there. *Held*, a breach of the covenant.

PARTNERSHIP — EXPIRATION OF TERM — GOODWILL INCLUDED IN "PROPERTY AND EFFECTS."— *Reynolds v. Bullock.* English High Court, Chy. Div., 26 W. R. 678. The defendant had taken the plaintiff into partnership, in his business of a chemist and druggist, for a term of twenty-one years. The articles provided that at the expiration of the term a valuation should be made of the property and effects of the co-partnership, and the value of the shares therein ascertained, and that all the property and effects of the co-partnership should become the absolute property of the defendant, but subject to the payment of the debts, and the plaintiff's share in the property and effects. Upon an action for account: *Held*, that upon the authority of Hall v. Barrows, 12 W. R. 322, 4 De G. J. & S. 150, and in the absence of any negative stipulation, the good-will was an asset of the co-partnership, and must be valued, and the value of the shares therein ascertained.

EJECTMENT—ESTOPPEL IN PASS—LIMITATIONS.— *McArthur v. Eagleson.* Queen's Bench of Ontario, 14 Canada L. J. 219. Plaintiff intending to return after a short interval, left his wife and home more than 30 years ago, and went to the United States, where he remained until a short time before this action. He had never communicated with his wife or friends whilst absent, and was, until his return, two or three years ago, believed to be dead. Several years since, and within seven years after his departure, his wife, acting on this belief, married again, and lived with her new husband on plaintiff's farm. They both mortgaged the farm to a building society, which sold it under a power of sale in the mortgage. On his return plaintiff brought ejectment against the purchaser from the company. *Held*, that he was entitled to recover, and that however culpable he may have been in not communicating with his wife, his negligence did not, even as against a purchaser under the *bona fide* belief that he was dead, estop him from claiming the land. *Held*, also (WILSON, J., dissenting), that he was not barred by the statute of limitations, for the possession of his wife was his possession.

EQUITABLE ASSIGNMENT — ORDER ON PROSPECTIVE DEBTOR TO PAY MONEY TO BECOME DUE ON CONTRACT — ADVANCES BY PROSPECTIVE DEBTOR TO ENABLE CONTRACT TO BE COMPLETED. — *Price v. Bannister.* English Court of Appeal, 26 W. R. 670. G had contracted to build a ship for the defendant, to be paid for by four installments. G owed money to the plaintiff, and before the completion of his contract with the defendant, and when only two installments had been paid, gave the plaintiff an order upon the defendant for the defendant to pay the plaintiff £100 out of the moneys due or to become due to G from the defendant. To enable G to complete his contract, the defendant subsequently made advances to G to a greater amount than £100, and at the completion of the vessel G had no more to receive on account of the contract. *Held*, by BRAMWELL and COTTON, L. J.J., diss. BRETT, L. J., that the order was a good equitable assignment of the money when it became due, and that the defendant could not set off advances subsequently made to enable G to complete his contract.

## ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

[Filed at Ottawa, June. 21, 1878.]

Hon. JOHN SCHOLFIELD, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" BENJAMIN R. SHELDON,
" PICKNEY H. WALKER.
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
} Associate Justices.

TAXES—ASSESSMENT— CONSTITUTIONALITY.—This was a joint application, made by the South Park commissioners and the county treasurer of Cook county, for judgment for an installment of a special assessment made by the South Park commissioners, pursuant to a statute entitled "An act to enable the corporate authorities of two or more towns, for park purposes, to issue bonds," etc. The only point made by appellant is, that the said act is void because its title shows that the act itself is intended to embrace more than one subject, contrary to section 13 of article 4 of the constitution. *Held*, by the court, that the said act is not in violation of any constitutional provision, as embracing more than one subject or matters not expressed in its title. The body of the act is germane to the title of the bill. Affirmed. — *Traynor v. People, and six other cases.*

MORTGAGE—FORECLOSURE—POWER OF NATIONAL BANKS TO TAKE MORTGAGE ON REAL ESTATE.—This was a proceeding to foreclose a mortgage. The answer shows that defendant had been the owner of the mortgage property, and had sold it to T, making him an absolute deed for the same. Afterwards defendant, claiming to have been defrauded, induced T to rescind the contract and to reconvey the property to him. But in the meantime T had borrowed money of the National Bank of Mendota, for which he had given a mortgage on the property in question to B, the president of the bank. The point is made by defendant that the mortgage to the president is a mortgage to the bank itself, and as such it is void under the banking act, which, defendant claims, forbids national banks from making loans upon any but personal security. *Held*, that the mortgage to the president is a mortgage to the bank. As to the question of the power of a national bank to take such a mortgage, SCOTT, J., after reviewing the question at length, says: "The provision declaring upon what security such associations may make current loans, viz., upon personal security, and the subsequent inhibition (in another section of the law) that no mortgage shall be taken on real estate except by way of security for debts previously contracted, must be understood to forbid absolutely such associations making loans upon security afforded by mortgagees on real estate. With the policy of the law on this subject we have nothing to do." Citing Fowler v. Scully, 72 Penn. 456; First National Bank v. National Bank, 2 Otto, 122; Matthews v. Skinker, 62 Mo. 329. Reversed.—*Fridley v. Bowen.*

BY-LAWS OF VOLUNTARY ASSOCIATION—SUIT BY EXPELLED MEMBER TO RECOVER FEES.—This was a suit by an individual member against a masonic lodge to recover certain moneys paid as initiation fees. The principal facts were these: Plaintiff had been a member in good standing of the lodge prior to June 7, 1873. The lodge had power by its by-laws, to which plaintiff subscribed on becoming a member, by giving the accused ample time and opportunity to defend himself, te expel a member for unmasonic conduct. On the 7th of June, 1873, he was served with a paper charging him with unmasonic conduct, and summoning him to appear at a certain date. A few days before the date, plaintiff notified the master of the lodge that he could not be present at the time appointed without interfering with his business duties. He was tried in his absence, found guilty, and expelled. The court below gave judgment for the defendant. On appeal this court say: "The fees paid by plaintiff in error were voluntarily paid, and there is no pretense that he was in that respect overreached or in anywise defrauded. It can not be pretended that his expulsion works a rescission of the contract under which the initiation fees were paid, and there is therefore no ground, of which we are aware, upon which the present suit can be maintained. We held, in People *ex rel.* v. Board of Trade, 80 Ill. 134, that we would not interfere to control the enforcement of the by-laws of merely voluntary associations, such as the defendant in error, but that such organization must be left to enforce their rules and regutions by such means as they may adopt for their government." Affirmed. — *Robinson v. Yates City Lodge.*

TAXES—ASSESSMENT— LEVY—STATUTE.—This proceeding is one instituted and prosecuted by the county collector of Cook County for the collection of certain special assessments, levied by the town of Lake upon the real estate within its bounds. The mode of collection is that pointed out in article 9 of the General Incorporation Act for Cities and Villages, passed in 1872, and incorporated into the Revised Statutes of 1874. Section 168 of that act provides that any city or incorporated town or village may, if it so determine by ordinance, adopt the provisions of this article without adopting the whole of this act; and where it shall have so adopted this article it shall have the right to take all proceedings in this article provided for and have the benefit of all the provisions hereof." It is insisted that the town of Lake is neither a city or village, and that the words, "incorporated town" must be construed to designate an incorporation other than that of a city or village, and that as to such incorporation this provision is unconstitutional, inasmuch as the title of the act limits its subject-matter to cities and villages, and does not refer to incorporated towns. DICKEY, J., after discussing at length the question at issue, concludes "that the town of Lake was and is a 'village,' in the sense in which that word is used in section 168 of the General Act of 1872, relating to cities and villages; that it therefore is one of the municipal corporations which by that section are authorized to avail themselves of the provisions of article 9 of that act." Scholfield, C. J., and Walker, J., dissent, holding that "the 168th section of the chapter, entitled 'cities, villages and towns,' has no application to incorporations like the town of Lake." Judgment affirmed.—*Martin v. People, and eight other cases.*

JUDGMENT BY DEFAULT—APPLICATION TO BE ALLOWED TO DEFEND — WHAT TERMS CAN NOT BE IMPOSED.—On the 21st of December, 1876, the defendant in error caused a judgment to be entered by confession before the clerk of the circuit court in vacation, against the plaintiff in error, upon a promissory note. On the 30th of December, 1876, the defendants in the suit below (now plaintiffs in error) moved the court to set aside the judgment and for leave to plead to the declaration, for the reasons that the judgment was entered for more than the amount due, and there was usury in the loan of the money for which the note was given. Affidavits to substantiate these allegations were filed. Counter-affidavits were also filed. The court ordered plaintiff and defendant each to make calculations of what was due, and then taking the plaintiffs' figures made an order staying the execution and granting leave to the defendants to plead to the plaintiff's declaration, upon the defendants paying into court for plaintiffs' use the sum as computed by plain-

tiff. From this defendant appealed. SHELDON, J. says: "The court below appears to have been satisfied from the affidavits (although upon information and belief as to the usury), that defendants, upon some terms, should be let in to make that defense. The question presented on the record is whether the order made by the court below, prescribing the terms upon which the defendant should be admitted to plead such defense, is in accordance with the law and practice in this state. The order made must have been upon the theory that this was an application to the equitable jurisdiction of the court, and the court would compel the party applying to do what was equitable." After reviewing the law and authorities on the subject, the court say: "We are inclined to hold that, agreeably to the practice which has been recognized by this court, no terms of the kind should have been imposed." Reversed—*Page v. Wallace.*

## ABSTRACT OF DECISIONS OF THE SUPREME COURT OF IOWA.

*June Term* (*Des Moines*), 1878,

Hon. JAMES H. ROTHROCK, Chief Justice.
" WM. H. SEEVERS, }
" JAMES G. DAY, } Associate Justices.
" JOSEPH M. BECK, }
" AUSTIN ADAMS, }

PRACTICE — SERVICE.—1. Code, sec. 2600, which provides that if the petition be not filed by the date fixed in the notice, and ten days before the term, the action will be deemed discontinued, is imperative. And where original notice recites that the petition will be on file, the 20th of November, and it was filed November 22d, it is not complete service. 3. The language of the statute, section 2600, is imperative. and the appearance of the defendants cannot be presumed as a waiver of the defect caused by the late filing of the petition. Opinion by BECK, J.—*Cibula v. Betts Manfg. Co.*

ATTACHMENT—EVIDENCE.—Plaintiff caused an attachment to issue against the goods of defendants, on the ground that defendants were about to dispose of their property with the intention of defrauding their creditors. One of the defendants being called, was asked: "Were you, at or prior to May 24th, 1876, disposing of your property for any purpose, or for what purpose?" "I was disposing of my property for the purpose of paying my debts; was making extra efforts, too." *Held*, that where an action is brought to set aside a sale as being fraudulent against creditors, the party charged, when called as a witness, may testify to his intent when the evidence tends to establish only the fraud. Opinion by SEEVERS, J.—*Sely v. Belden.*

INDICTMENT—THREATENING TO KILL—PRACTICE. 1.—Where an indictment sets forth that the defendant did willfully, maliciously, verbally threaten to kill and murder Zenana Staats and T. S. Woods it is sufficient, and does not allege a legal conclusion. The words of the defendant bear out of the gist of the offense, which is found in the intention of the defendant to thereby convey a threat. 2. An indictment does not necessarily charge two offenses where it alleges that a threat was made against two persons. 3. Where the defendant charged in the indictment with making the threat, asked the court to instruct the jury that the charge could not be established by proofs of acts other than words spoken, or written, or printed communication: *Held*, that the instruction was properly refused, because it was erroneous and prejudicial to the defendant. Opinion by BECK, J.—*State v. O'Malley.*

DEED—CONSIDERATION.—In an action to set aside a conveyance where it appears that the land formerly belonged to G, deceased, who, in her lifetime, executed a deed, to plaintiff, and defendant claimed title derived through N, one of the defendants, also grantee of S, who conveyed to him (W) prior to the execution of the deed to plaintiff, on question as to the validity of deeds plaintiff assails W's deed, on the ground of want of consideration; consideration expressed in the deed was one dollar, and at the time of the conveyance defendant agreed to furnish his grantor, G, certain fruit trees. *Held*, that the agreement of itself was a consideration sufficient to support the deed, even if defendant failed to perform his agreement. Opinion by ADAMS, J.—*Gray v. Lake.*

## ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

*March Term*, 1878.

HON HORACE GRAY, Chief Justice.
" JAMES D. COLT, }
" SETH AMES, }
" MARCUS MORTON, } Associate Justices.
" WILLIAM C. ENDICOTT, }
" OTIS P. LORD, }
" AUGUSTUS L. SOULE, }

CHALLENGE TO THE ARRAY—TRIAL BY THE COURT—A trial of a challenge to the array of the petit jury by the court, and not by a jury or triers appointed for the purpose, offered the defendant no ground of exception. By the common law, a challenge to the array might be tried either by the court itself, or by such officers or persons as it might designate. Lloyd v. Waller, 2 Rol. R. 363; 2 Hale P. C. 275; Bac. Ab. Juries, 312; 7 Dane Ab. 331. And in this commonwealth, as elsewhere in New England, all challenges have been usually tried by the court. Samuel Dexter, *arguendo*, in Burden v. Burden, 5 Mass. 61, 71; 7 Dane, Ab. 384; Com. v. Knapp, 9 Pick. 496, 499; State v. Jewell, 33 Me. 583; State v. Howard, 17 N. H. 171. 191; State v. Clark, 42 Vt. 629; State v. Potter, 18 Conn. 166, 171. Opinion by GRAY, C. J.—*Com. v. Walsh.*

EMBEZZLEMENT—OBTAINING PROPERTY BY FALSE PRETENSES—LARCENY.—If a person honestly receives the possession of the goods, chattels or money of another upon any trust, express or implied, and after receiving them fraudulently converts them to his own use, he may be guilty of the crime of embezzlement, but can not be of that of larceny; except as embezzlement is by statute made larceny. If the possession of such property is obtained by fraud, and the owner of it intends to part with his title as well as his possession, the offense is that of obtaining property by false pretenses, provided the means by which they are acquired are such as, in law, are false pretenses. If the possession is fraudulently obtained with intent, on the part of the person obtaining it, at the time he receives it, to convert the same to his own use, and the person parting with it intends to part with his possession merely, and not with his title to the property, the offense is larceny. Opinion by LORD, J.—*Com. v. Barry.*

SLANDER—VARIANCE—DESCRIPTIVE ALLEGATIONS. —1. To sustain a count which alleges that the defendant accused the plaintiff of the crime of larceny by words spoken of and concerning the plaintiff, substantially as follows: "He (meaning the plaintiff) is a rascal, a villain and a thief," the plaintiff must prove that the defendant accused him of said crime by words substantially like those alleged. Payson v. Macombes, 3 Allen, 69. And it is not sufficient to prove accusations of description and fraud which did not

impart and could not be understood as charging said crime. 2. The allegation in a count for slander: "That said false and malicious accusations were made to the Trustees of B. U., and members of the B. U. A.," is material. If the plaintiff alleges a publication generally, the fact may be proved by any person who heard the words. But if he adds any allegations which narrows and limits that which is essential, it becomes descriptive, and must be proved as laid. Chapin v. White, 102 Mass. 139; Davis v. Hawley, 112 Mass. 137. And the fact that the person to whom the accusation is made happens to be one of such trustees or members is not sufficient, there being no evidence that the publication was made to said trustee or members as a body. Opinion by MORTON, J.—*Perry v. Porter.*

## ABSTRACT OF DECISIONS OF SUPREME COURT OF TENNESSEE.

*April Term (Jackson), 1878.*

HON. JAMES W. DEADERICK, Chief Justice.
" ROBT. MCFARLAND, }
" PETER TURNEY, } Associate Justices.
" J. L. T. SNEED, }
" T. J. FREEMAN, }

LANDLORD'S LIEN.—The act of 1875, ch. 116, gives the landlord a lien on the crop of his tenant for necessary supplies of food and clothing furnished, without any written contract therefor. Opinion by SNEED, J.—*Lewis v. Mahon.*

EVIDENCE — IMPEACHING WITNESS. — A witness may be impeached by evidence of previous contradictory statements, though, in answer to the necessary preliminary questions, he disavows remembering that he made such statements. Acc. Janeway v. State, 1 Head. 130. Opinion by MCFARLAND, J.—*Jetten v. Brownsville Savings Bank.*

PAROL EVIDENCE—WRITTEN CONTRACT.—The rule excluding parol evidence does not apply in cases where the original contract was verbal and entire, and part only of it was reduced to writing. Acc. Seinan v. Swart, 11 Hum. 308; 1 Greenl. Ev., § 304. Opinion by FREEMAN, J.—*Malone v. Davidson.*

NEGOTIABLE PAPER—COLLATERAL. — Negotiable paper transferred as collateral security before maturity is subject to all equities then existing; and the maker is protected if before such transfer he has paid the note to the rightful holder. Distinguishing Gosling v. Griffin, mss. Jackson, 1875, which overrules Vallentine v. Howell, 5 Sneed, 441. Opinion by DEADERICK, C. J.—*Richardson v. Rice.*

IMPEACHING WITNESS—WEIGHT OF EVIDENCE.—If a witness be attacked or impeached by other witnesses, his credibility is not to be determined by any rule as to weight of evidence; but it is in all cases to be left to the jury to determine to what extent they will give him credit. Acc. Kinchelow v. State, 5 Hum. 12. Opinion by FREEMAN, J.—*Beaumont v. Chew.*

JUDGMENT IN MAGISTRATE'S COURT. — An action may be maintained in the circuit court on a judgment obtained before a magistrate, notwithstanding execution has issued under such judgment and has been levied on land and returned into the circuit court for condemnation. The judgment is not thereby extinguished or vacated. Opinion by DEADERICK, C. J.—*Boyd v. Mann.*

CORRECTING JUDGMENT — CHANCERY JURISDICTION.—Where the magistrate's court did not render its judgment for the correct rate of interest according to the stipulations of the contract under the conventional interest law of 1869-70, the error can not be corrected by a court of chancery in a suit brought to enjoin the judgment. Opinion by FREEMAN, J.—*Jones v. Whitehead.*

## A CARD.

*To the Editor of the Central Law Journal:*

A card having been published in this Journal by me in reference to the publication by W. J. Gilbert, of St. Louis, of a book styled "Thompson's Tennessee Cases," I desire to state to the public that since the publication of my card, Mr. Gilbert has adjusted the controversy between us, respecting the publication of that book, in an honorable manner, and that the further sale of said book has been suspended.

Respectfully, SEYMOUR D. THOMPSON.

St. Louis, July 31, 1868.

## QUERIES AND ANSWERS.

[In response to many requests from lawyers in all parts of the country, we have decided to commence again the publication of questions of law sent to us by subscribers. We propose to make this essentially a subscriber's department—*i. e.*, we shall depend, to a large extent, upon them to edit this column. Queries will be numbered consecutively during the year, and correspondents are requested to bear this in mind when sending answers.]

### QUERIES.

46. CAN A JUDGE OR JUSTICE OF THE PEACE sit in judgment in a cause where his domestic servant is a party, or is interested in the result of the litigation?

Ithaca, N. Y. M. K.

47. A CATHOLIC PRIEST borrows money to improve the school-house connected with the church under his charge, and gives a note of the church by himself as pastor. Who, and how do you sue on such note? N. H. E.

48. BANKRUPTCY—FORECLOSURE—LIMITATION.—A has been adjudicated a bankrupt, and an assignee appointed. Previous to the adjudication there was a mortgage on the real estate of the bankrupt given by him, and which came due about the time of the adjudication. The mortagee obtained leave of the bankruptcy court to foreclose in the state court upon notice to the assignee. More than two years have elasped since leave to foreclose was granted, and no proceedings have been commenced on the part of the mortgagee to foreclose. Is the foreclosure of the mortgagee barred by § 2 of bankrupt act as amended? The section provides that "no suit at law or in equity, shall be maintainable by or against such assignee, or by or against any person claiming an adverse interest touching the property or rights of property aforesaid in any court whatsoever, unless the same shall be brought within two years." It has been held, I believe, that the section applies to the redemption of a mortage. Why, then, should it not be applied to foreclosure?

J. MCN.

### ANSWERS.

No. 37.

(6 Cent. L. J. 497.)

More than one subscriber writes to us as to this query in this strain: "I would like very much to see a reasonable answer to query 37, Vol. 6, p. 499."

No. 40.

(7 Cent. L. J. 39.)

The legal title to the ink-stand is in B., and inde-

pendently of all statutes, he can maintain any one of the three following common law actions: He can rescind the sale, and sue for money had and received; he can sue in trover for the value of the ink-stand; he can maintain detinue for it. 1 Pars. on Contr. (marg. pp.) 519, 526; Story on Sales, §§ 238, 300, 303, 303*a*; 2 Kent Com. (marg. pp.) 492, 493; Hinde v. Whitehouse, 7 East. 571; Warren v. Leland, 2 Barb. (S. C.) 613; Stamps v. Bush, 7 How. (Miss.) 255: Ingersoll v. Kendall, 13 Sm. & Marsh. (Miss.) 611; George's Dig. Miss. Reps. 667.

J. D. GILLAND.

Vicksburg, Miss.

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No. 36.

(6 Cent. L. J. 479.)

As to this query, "G" writes as follows from Indianapolis, Indiana: "The second answer to query No. 36, signed "C and B," Vincennes, Ind., published on page 39 of volume 7, of your journal, is doubtless good law but in the face of State v. Barbee, 3 Ind. 258, and at least two cases in 4 Ind. following the same, we would be pleased to hear from the gentlemen as to the authorities sustaining their proposition."

## NOTES.

THE different law schools in the west already announce the opening of their next sessions. The law school of the State University at Columbia has changed its opening day from the first Monday of October to the second Monday of September. The St. Louis Law School opens October 15th, 1878. Students will be admitted to the senior class, on examination, on October 10th and 11th. There are six scholarships open to students in this school. Outside of this state, the Law Department of the Wisconsin University will open on September 4th. The collegiate year of the Union College of Law at Chicago begins on September 11th, and lasts for 36 weeks. The Bloomington Law Institute opens September 12th. There are two prizes of $100 and to $50, respectively, open for competition by the students of this institution.

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MR. JUSTICE MILLER'S recovery is now said to be complete.———There are, according to the San Francisco *Call*, some very rich lawyers in that city. Chief Justice Wallace, of the supreme court, was rich before he reached his present position. His fortune is roughly estimated at from $100,000 to 200,000. Ex-Judge O. C. Pratt is thought to be worth a million or so. Eugene Casserly and Judge Hager are accounted wealthy. J. B. Haggin, who took to finance more than law, is reported to be worth $500,000 or $800,000. Lloyd Tevis, of similar taste, is worth about the same. Many others might be mentioned.———Three judges of the New York Court of Appeals, viz.: Judges Earl, Miller and Hand, are in Europe———The first woman who has applied to the California bar for admission has been rejected for failing to pass a satisfactory examination. ———William T. McCoun, nearly fifty years ago a vice-chancellor of the State of New York, and afterwards a justice of the supreme court and a judge of the court of appeals, died on the 18th inst. He was in the 93d year of his age and was admitted to the bar of that state at the beginning of this century, when Alexander Hamilton, Thomas A. Emmet and Aaron Burr were its leaders. Another New York Judge who has passed away during the last week is John A. Lott, formerly a judge of the court of appeals and a member of the commission of appeals during its whole existence.

THE criminal code under consideration in the English Parliament, permits the evidence of defendants in criminal cases in a somewhat modified form. The section altering the law in this respect is as follows: "The court shall inform the defendant, whether he is defended by counsel or not, that he may make any statement he pleases to the charge against him, and that if he does so he will, after he has made it, be questioned by the counsel for the prosecution; or, if there is no counsel for the prosecution, as the court may direct." An "habitual criminal" criticises this provision in this language: "What, let me ask, will become of the defendant who, after this considerate invitation, declines to make 'any statement he pleases,' having, in fact, no statement that pleases him to make? What, again, is likely to happen to him if he is to be tormented with questions by the counsel for the prosecution, by the court, and by the jury—for even these amateurs are to be allowed to operate upon him, since it is said 'both the court *and the jury* (with the permission of the court) may ask the defendant *any questions which they might ask of a witness*.' If the accused is stupid, and does not return ingenious answers to the interrogations of some juryman, he will most certainly be convicted, on the assumption that he has no reasonable explanation to give. But if a prisoner should reply with readiness or wit to some question laboriously concocted by the entire jury, and put with pompous satisfaction by the foreman, the retort of the twelve will take the form of a verdict of guilty—for it is easier to pardon a considerable injury done to another, than a slight inflicted on ourselves; and they who might take a lenient view of the picking of another man's pocket will avenge with ferocity any diminution of the estimate they have formed of their own abilities. It is, moreover, a serious objection to this part of the bill that it provides that "the defendant *shall not be sworn as a witness*, nor be *liable to any punishment* for making false statements, either before, during, or after his examination.' The high value which is attached to all oaths is shown—like our passion for pounds, shillings and pence—by our constant use of them. All imprecation is, indeed, when rightly regarded, a kind of bet in which one backs one's assertion at the peril of one's hereafter, the odds being, of course, indicated by the number and forcibility of the asseverations employed. Now, it is notorious that amongst the class from which juries are drawn no one would be believed who, upon his statements being challenged in the common formla, "Will you lay a quart about it?" should decline to this extent to support his opinion. But with what contempt would not he be received who should refuse, not only to bet, but to swear as well? It were some advantage if a prisoner having to explain were allowed to say, as of old, "I am innocent, and I'll pick up hot iron;" "I am innocent, and will undertake to kill the prosecutor, in proof of what I say;" "I am innocent, if not, I will drown in a water butt." It were something, I say, if one might declare when accused, "I am not guilty; I will swear to it, and, if falsely, be imprisoned both for the false offense and the false oath." But of what value to a prisoner is a statement made by him, when all the world knows that he runs no risk in the making of it, and that the law holds him so likely to speak untruly that it will not trouble to punish him for what it regards as inevitable perjury? There is a saying which Mr. Carlyle is fond of quoting in the original German—though he does not lay it to heart to the extent of observing it—that speech is silvern, but silence is golden; and I would ask of Sir Fitzjames Stephen why does he attempt this backward alchemy of turning our gold into baser metal? Why does he seek to catch the taciturn in a dilemma, and lead the loquacious into a snare?"